September 14, 1965

TO THE MEMBERS OF THE STANDING COMMITTEE AND THE ADVISORY COMMITTEES ON RULES OF PRACTICE AND PROCEDURE:

Gentlemen:

At the request of Judge Maris, I am attaching a revision of pages 43 and 44 to Exhibit E (amendments to the Criminal Rules), Agenda D-2.

Also attached are the following pages for substitution. The changes are not of substance but were made because of typographical errors and inconsistencies:

Exhibit E - page 18

Exhibit C - pages 2, 9, 11, 15, 38, 43
48, 72, 77, 88, and 114

Sincerely,

William E. Foley
Secretary

Enclosures

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
SUPREME COURT BUILDING
WASHINGTON 25, D. C.

5050 United States Courthouse
Philadelphia, Pa. 19107
September 13, 1965

Honorable William E. Foley
Deputy Director
Administrative Office of the U. S. Courts
Supreme Court Building
Washington, D. C.

Dear Bill:

I am authorized by the standing committee to make an additional change in the rules amendments appended to our Report to the Judicial Conference. This is the amendment to which I referred in my letter to the members of the standing committee dated September 7th, a copy of which was sent to you.

The amendment is to add at the end of the proposed Rule 35 on page 43 of Exhibit E the following additional sentence:

> The court may also reduce a sentence upon revocation of probation as provided by law.

In addition a final paragraph should be added to the advisory committee's note to Rule 35 near the middle of page 44, reading as follows:

> The third sentence has been added to make it clear that the time limitation imposed by Rule 35 upon the reduction of a sentence does not apply to such reduction upon the revocation of probation as authorized by 18 U.S.C. § 3653.

I will appreciate it if you will have pages 43 and 44 of Exhibit E retyped and reproduced as corrected for substitution in the desk books of the members of the Judicial Conference. I will appreciate it also if you will send the revised pages to the members and reporters of the rules committees to which the original report has been sent.

Sincerely yours,

Albert B. Maris

cc. Members of Standing Committee
Judge Pickett
Dean Barrett

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
SUPREME COURT BUILDING
WASHINGTON 25, D. C.

5050 U.S. Courthouse
Philadelphia, Pa. 19107
September 13, 1965

Honorable George N. Beamer
United States District Judge
U.S. Post Office and Courthouse
Hammond, Indiana 46325

Dear Judge Beamer:

Your letter of July 22d was brought to my attention on my return from vacation and I am happy to report that the standing Committee on Rules of Practice and Procedure is recommending to the Judicial Conference that proposed amended Criminal Rule 35 be further amended by adding at the end of it the following sentence:

> The court may also reduce a sentence upon revocation of probation as provided by law.

We are greatly indebted to you for calling to our attention the apparent inconsistency between Rule 35 and 18 U.S.C. § 3653.

With kindest regards, I am

Sincerely yours,

Albert B. Maris

cc. Mr. Foley

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
SUPREME COURT BUILDING
WASHINGTON, D. C. 20544

September 9, 1965

The Honorable Albert C. Maris
Senior Circuit Judge
United States Court of Appeals
for the Third Circuit
Philadelphia, Pennsylvania 19107

Dear Judge Maris:

I approve entirely of the additional sentence for Criminal Rule 35 proposed in your letter of September 7th.

Sincerely,

CAW

Charles Alan Wright

Copy to Mr. William E. Foley

Mrs Burgess

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
SUPREME COURT BUILDING
WASHINGTON 25, D. C.

5050 U.S. Courthouse
Philadelphia, Pa. 19107
September 7, 1965

Hon. George H. Boldt
Tacoma, Wash.

Peyton Ford, Esq.
Washington, D.C.

Dr. Mason Ladd
Iowa City, Iowa

Prof. James William Moore
New Haven, Conn.

J. Lee Rankin, Esq.
New York, N.Y.

Bernard G. Segal, Esq.
Philadelphia, Pa.

Prof. Charles Alan Wright
Austin, Tex.

Hon. J. Skelly Wright
Washington, D.C.

Gentlemen:

I regret very much that in the mass of papers awaiting me upon my return to my office last week I completely overlooked the enclosed letter from District Judge George N. Beamer of the North District of Indiana, which calls attention to a clear inconsistency between Criminal Rule 35, both as it now exists and as we propose to amend it, and 18 U.S.C. § 3653, which authorizes the district court to reduce a sentence upon revocation of probation, which may well take much more than 120 days after the sentence was originally imposed and its execution suspended. Dean Barrett suggests that this inconsistency can easily be corrected by adding at the end of proposed Rule 35 an additional sentence reading as follows:

> "The court may also reduce a sentence upon revocation of probation as provided by law."

Since we still have time I am inclined to think that we ought to eliminate this inconsistency by adding the sentence in question, and an appropriate explanatory sentence to the advisory committee's note to the amended rule which we are recommending to the Judicial Conference.

Since, however, the time to do so is rather short I shall assume that I am authorized to make this addition to Rule 35 if I hear from at least a majority of you in the affirmative and if no one of you dissents.

May I hear from you promptly.

cc. Judge Pickett
Dean Barrett
Mr. Foley

Sincerely yours,

ALBERT B. MAIRS

Mrs. Burgess
fpl

MAYER, FRIEDLICH, SPIESS, TIERNEY, BROWN & PLATT
231 SOUTH LA SALLE STREET
CHICAGO, ILLINOIS 60604

TELEPHONE STATE 2-0600
EUROPEAN OFFICE
4 PLACE DE LA CONCORDE
PARIS 8e
TELEPHONE ANJOU 45-23
CABLES
LEMAY, CHICAGO
LEMAYLAW, PARIS

September 13, 1965

Honorable Albert Maris
United States Court of Appeals
for the Third Circuit
Philadelphia, Pennsylvania

Dear Judge Maris:

I have examined the provisions relating to appeals included in the drafts of civil and criminal rules which the Committee on Practice and Procedure is proposing to the Judicial Conference. One seeming and perhaps inadvertent discrepancy between the civil and criminal rules caught my eye.

The proposed new criminal rule 37 contains as its last paragraph the following, which conforms exactly to what I recall the Appellate Committee agreed upon at its last meeting:

> "Upon a showing of excusable neglect, the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing the notice of appeal otherwise allowed to any party for a period not to exceed 30 days from the expiration of the original time prescribed by this paragraph."

This provision is identical with that which the preliminary draft of Appellate Rules (Rule 4(a), last paragraph) proposed for the civil rules except for the inclusion of the underscored phrases. Our Committee thought the additional phrases desirable for reasons which seem obvious.

In the proposed new rule 73(a) (on page 82 of the proposed amendments to the civil rules), the comparable clause is:

> "Except that * * * (2) upon a showing of excusable neglect the district court in any action may extend the time for filing the notice of appeal not exceeding 30 days from the expiration of the original time herein prescribed."

This is in substance the original language of our proposed rule 4(a) and of the last sentence of rule 4(d) (for criminal cases), but it omits the clarifying clauses "before or after" the time has expired, with or without motion and notice." I am sure that our Committee intended that these additions be made to the civil rule as well as to the criminal rule and can see no reason why there should be a difference. I suggest, therefore, that they be added to the proposed new rule 73(a)(2) before it is finally approved by the Judicial Conference.

I assume that the omission was inadvertent but if it was intentional I would be interested in knowing the reason.

Respectfully yours,

Robert L. Stern

RLS:js

cc: Judge Prettyman
Mr. William E. Foley
Professor Bernard Ward
Professor Benjamin Kaplan

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
SUPREME COURT BUILDING
WASHINGTON 25, D. C.

5050 U.S. Courthouse
Philadelphia, Pa. 19107
September 2, 1965

Hon. George H. Boldt
Tacoma, Wash.

J. Lee Rankin, Esq.
New York, N.Y.

Peyton Ford, Esq.
Washington, D.C.

Bernard G. Segal, Esq.
Philadelphia, Pa.

Dr. Mason Ladd
Iowa City, Iowa

Prof. Charles Alan Wright
Austin, Tex.

Prof. James William Moore
New Haven, Conn.

Hon. J. Skelly Wright
Washington, D.C.

Gentlemen:

Pursuant to the authority which you conferred upon me at our committee meeting in June I have reviewed the rules changes proposed by Professors Currie and Ward and I have also considered with the reporters the report of the Special Committee on Federal Rules of Procedure which was approved by the House of Delegates of the American Bar Association on August 12th. My conclusion is that the action taken by our committee in June with a few changes which I have authorized Mr. Foley to make in the draft rules to be appended to our committee report, and which are discussed below, adequately meet the viewsof the A.B.A. committee and that it is, therefore, not necessary for us to hold a special meeting of the standing committee to consider the A.B.A. recommendations. In this connection I enclose to each of you copies of the following pertinent documents:

(a) Letter of Gibson Gale, Jr., Secretary of the A.B.A., to me, dated August 18th, together with a copy of the report which he enclosed of the A.B.A. Special Committee on Federal Rules of Procedure dated August 1965 - No. 53.

(b) My letter dated August 18th to the four reporters requesting their views as to the recommendations of the A.B.A. committee and whether a meeting of the standing committee should be held to consider them.

(c) Letters from Professor Currie to me dated August 20th, August 23rd and August 30th, together with a memorandum from Professor Currie to the Advisory Committee on Admiralty Rules dated August 30th.

(d) Letter from Dean Barrett to me dated August 23rd.

(e) Letter from Professor Ward to me dated August 25th.

(f) Letter from Professor Kaplan to me dated August 30th.

(g) Letters to Mr. Foley from me dated August 18th and September 1st, authorizing him to make certain changes in the rules amendments to be included in the report of our committee to the Judicial Conference.

May I summarize the matter as follows:

Unification of Civil and Admiralty Procedure

The A.B.A. approves our unification proposals and substantially all of the rules amendments which are proposed to carry unification into effect. The subcommittee on admiralty rules of the A.B.A. committee did, however, make certain editorial and technical suggestions with respect to a few specific rules which were communicated to Professor Currie and which are referred to in his letters to me. Two of these suggestions, those with respect to Rule 9(h) and Rule 14(c), raise questions which I am satisfied require some modification of those proposals.

Rule 9(h) is the rule which provides the rubric to be employed by a pleader who desires to stamp his claim as a maritime claim which is to have the traditional admiralty treatment to the extent that such special treatment is being preserved in the unified rules. As presented to our committee in June by the Advisory Committee on Admiralty Rules the pertinent portion of this rule reads:

> "A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district

> court on some other ground, or that arises under a statute conferring admiralty and maritime jurisdiction upon the district court and, as an alternative, in terms conferring the right to maintain a civil action for damages with the right of trial by jury, may contain a statement identifying the claim as an admiralty or maritime claim for the purpose of Rules 14(c), 26(a), 38(e), 73(h), 82 and the Supplemental Rules for certain Admiralty and Maritime Claims."

It is the underlined portion of this language to which the A.B.A. committee objects and which they ask to have stricken out as confusing and unnecessary. This particular language was inserted at a recent meeting of the Advisory Committee to meet the views of Judge Dimock who thought that it was needed to cover Jones Act cases. The other members of the advisory committee doubted that the language was necessary but evidently thought that it would do no harm. The A.B.A. subcommittee disagrees, however. I quote the report of the A.B.A. subcommittee on this rule.

> The clause in the May 1965 draft, "or that arises under a statute conferring admiralty and maritime jurisdiction upon the district court and, as an alternative, in terms conferring the right to maintain a civil action for damages with the right to trial by jury," is confusing. It was intended to be a special provision for the Jones Act, 46 U.S.C. § 688, which would seem to be unnecessary since a case under that act is presumably one "within the jurisdiction of the district court on some other ground" -- the general federal question jurisdiction, 28 U.S.C. § 1331, and the saving to suitors clause, 28 U.S.C. § 1333. We would prefer that the reference be eliminated altogether so that the rule would read . . . with the italicized passages eliminated.

I completely agree with the A.B.A. subcommittee that the language in question is confusing and quite unnecessary. Professor Currie is of the same view although he, properly, feels bound by the last action of his subcommittee. We are not so bound, however, and I am quite clear that this is

one place where we can meet the views of the A.B.A. and at the same time simplify and improve one of the basic unification rules. Feeling sure that you would approve meeting the A.B.A. point here I have authorized Mr. Foley, by my letter of August 18th, to delete the language in question from Rule 9(h).

The second major suggestion of the A.B.A. subcommittee on admiralty rules was with respect to Rule 14(c) relating to impleader in admiralty and maritime cases. Judge Pope, Professor Currie and the members of the Advisory Committee on Admiralty Rules agree to the validity of the A.B.A. committee's suggestions with respect to this rule and Professor Currie has prepared a substitute which in my letter of August 18th I authorized Mr. Foley to insert in our report in lieu of the previous text. Here again I felt sure that you would approve such action.

The other recommendations of the A.B.A. committee in the admiralty area relate primarily to certain features of the supplemental rules which will be under continuing study by our advisory committee and which will undoubtedly be fully considered by that committee and incorporated to the extent appropriate in the revised and expanded supplementary rules which they propose in due time to report. Accordingly I have suggested no changes to Mr. Foley with respect to these rules.

There is, however, one further admiralty matter which Professor Currie himself has discovered and which is indicated in his memorandum of August 30th. It relates to Supplemental Rule D in which, as his memorandum points out, we should provide for service of summons on the adverse parties instead of mere notice to them. This correction of what seems to be an obvious error I have authorized Mr. Foley to make by my letter of September 1st.

Appellate Rules

The A.B.A. committee gave consideration to the complete draft of uniform rules of appellate procedure which was published in March 1964 and has made a number of recommendations with respect to them which our Advisory Committee on Appellate Rules will undoubtedly consider fully at future meetings. With a single exception none of the recommendations disapproves provisions which we have included in the appellate sections of the civil and criminal rules although some of them would call for additions or new provisions

in those rules. The single exception, as pointed out by Professor Ward, is the suggestion that the copy of the docket entries to be included in the record on appeal should not have to be certified. This, however, is a very minor point which can certainly be dealt with by our advisory committee in connection with its further consideration of the appellate rules.

It happened that in preparing the draft of Civil Rule 73 for inclusion in the appendix to our report two subdivisions, (d) and (f), as to which amendments had been approved by the appropriate advisory committees were inadvertently omitted. I have accordingly directed Mr. Foley to incorporate these proposals in the final draft.

Civil Rules Amendments

It is a cause for much gratification that the A.B.A. committee has approved with enthusiasm all of the proposals submitted by the Advisory Committee on Civil Rules. The A.B.A. subcommittee's suggestions with respect to these rules are quite minor and are fully dealt with by Professor Kaplan in his letter to me of August 30th. It is obvious that no changes in the draft of these proposals need be made.

Amendments to the Criminal Rules

The A.B.A. committee approved all of the amendments to the criminal rules except Rules 12.1, 15, 16 and 24. In addition they recommended further amendment of Rules 6 and 49. Their views have been met in part by our action in withdrawing and remanding to the Advisory Committee on Criminal Rules for further consideration the proposals involved in Rules 12.1 and 15. The comments of Dean Barrett, the Reporter of the Advisory Committee, with respect to the A.B.A. committee recommendations as to Rules 6, 16, 24 and 49 are set out at length in his letter to me of August 23rd. It seems to me that while the A.B.A. suggestions as to these rules undoubtedly call for further study by the advisory committee they do not require action by our committee at this time.

Conclusion

My conclusion is, as stated above, that, if you approve the changes which I have authorized Mr. Foley to make as outlined in my letters to him of August 18th and September 1st and as described in this letter, it will not be necessary to hold a special meeting of the standing committee to consider the recommendations of the American Bar Association. I will be grateful if each of you will let me know promptly whether you concur with this conclusion. May I add that it is not too late to withdraw any of the changes I have authorized if you think they should not be made. In that case, of course, it might be necessary to have a meeting to consider what other action should be taken.

Sincerely yours,

ALBERT B. MARIS

Copy to Mr. Foley

August 27, 1965

Professor Bernard J. Ward
Notre Dame Law School
Notre Dame, Indiana

Dear Professor Ward:

This will acknowledge receipt of your letter of August 25. I have mailed a copy of your letter concerning the ABA material (addressed to Judge Maris) to the members of the standing Committee, Judge Prettyman, Dean Barrett, and to Professors Kaplan and Currie. I did not send it to Professors Kennedy and Cleary as they have not been receiving the material concerning Exhibits C and E. However, if you would like them to receive this, please let me know.

Regarding copies of proposed Rule 37 of Criminal and proposed Rules 73-75 and 81 of Civil, I have not yet sent this material to the members of the Appellate Committee. My instructions from Judge Maris were to send the report only to the members of the standing Committee, the Judicial Conference members, and to the chairmen and reporters of the Rules Committees. I will be happy to comply with your request but thought I should check with Judge Maris on Wednesday, when he returns to his office. My thought is that he may not want members of one committee to receive their portion of the material without the other committee members receiving the same.

I will hold your covering letter and if Judge Maris has no objection, I will send the proposals on the rules mentioned above, together with your covering letter, to the appellate members.

With best wishes,

Sincerely,

Peggy Burgess

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
SUPREME COURT BUILDING
WASHINGTON 25, D. C.

August 30, 1965

TO THE ADVISORY COMMITTEE ON APPELLATE RULES

At the conclusion of our May, 1965 meeting I was asked to prepare drafts of Rule 37 of the Federal Rules of Criminal Procedure and of Rules 73-75 of the Federal Rules of Civil Procedure which would include the substance of proposals for change in appellate practice and procedure represented by such of the provisions of the Uniform Appellate Rules which deal with the same matters as the Criminal and Civil Rules.

The purpose of those drafts was to permit the Standing Committee to determine whether the changes in effect recommended by the Appellate Rules Committee to the present Criminal and Civil Rules should be incorporated with impending amendments to those rules proposed by the Criminal, Civil and Admiralty Rules Committees.

At its meeting, which was attended by Judge Prettyman and myself, the Standing Committee voted to incorporate the changes as amendments to the appropriate Criminal and Civil Rules. The proposals of the Appellate Rules Committee were adopted with only these exceptions:

1. The Standing Committee did not adopt the provision to the effect that a petition for leave to appeal in forma pauperis should be treated as embodying a notice of appeal. The Committee feared that specific mention of one of several informal attempts to appeal might cast doubt on the efficacy of others.

2. The Standing Committee did not adopt the provision to the effect that a petition for rehearing by the Government filed within the 30 days allowed for appeal should ter-

minate the running of the time for its appeal in a criminal case. The Committee had no objection to the provision, but desired to have it reconsidered in connection with the larger question of the effect of motions for rehearings on the termination of the time for appeal, a question which it referred to the Committees involved.

3. The Standing Committee did not adopt the provision to the effect that if a district judge erroneously holds a post judgment motion timely, the motion terminates the running of the time for appeal. This provision, determined upon by the Appellate Rules Committee for the first time at its May, 1965 meeting in response to a slightly different provision offered by the Civil Rules Committee, has been referred to the two Committees for further consideration.

4. The Standing Committee voted to restore the provision recommended by the Appellate Rules Committee to the effect that a district judge may extend the time for appeal upon a showing of any form of excusable neglect. That provision appeared in the Preliminary Draft and was not recalled by the Appellate Rules Committee until its meeting of May, 1965.

I enclose copies of proposed amendments to Rule 37 of the Federal Rules of Criminal Procedure and to Rules 73-75 of the Federal Rules of Civil Procedure. These amendments result entirely from recommendations of the Appellate Rules Committee, with the exception of the amendments to subdivisions (d) and (f) of FRCP 73 and the addition of subdivision (h) thereto, which changes were recommended by the Admiralty Rules Committee.

These amendments will be presented to the Judicial Conference for its approval at its session on September 22, 1965.

Bernard J. Ward
Reporter
Appellate Rules Committee

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
SUPREME COURT BUILDING
WASHINGTON 25, D. C.

ALBERT B. MARIS
CHAIRMAN

AUBREY GASQUE
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES

DEAN ACHESON
CIVIL RULES

PHILLIP FORMAN
BANKRUPTCY RULES

JOHN C. PICKETT
CRIMINAL RULES

WALTER L. POPE
ADMIRALTY RULES

E. BARRETT PRETTYMAN
APPELLATE RULES

August 25, 1965

Mrs. Peggy Burgess
Committee on Rules of Practice
and Procedure
Supreme Court Building
Washington 25, D. C.

Dear Peggy:

I enclose the original of a letter to Judge Maris on the ABA proposals. Could you have copies made of it for the other members of the Standing Committee and for the other Reporters and for Judge Prettyman and send them out? If so, please send on the original to Judge Maris when you have finished. Meanwhile, I am sending him a copy.

I do not wish to deplete your supply of the copies of the report to the Standing Committee, but I would very much like to be able to send to the members of the Appellate Rules Committee copies of proposed Rule 37 of the Criminal Rules and proposed Rules 73-75 and 81. That is their contribution to the proposed amendments, and I have the uneasy feeling that I have been neglecting them as to the progress of the work. If you can arrange to have those parts sent out to them, I enclose a cover letter to accompany.

With every best wish,

Sincerely,

Bernard J. Ward
Bernard J. Ward

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
SUPREME COURT BUILDING
WASHINGTON 25, D. C.

August 25, 1965

The Honorable Albert B. Maris, Chairman
Committee on Rules of Practice
and Procedure
5050 United States Courthouse
Philadelphia, Pennsylvania

Dear Judge Maris:

I have examined the report of the Sub-Committee on Proposed Uniform Rules of Federal Appellate Procedure of the American Bar Association as you requested in your letter of August 18, 1965.

While certain of the suggestions for changes in the Proposed Uniform Rules made by the Sub-Committee involve provisions which have been incorporated in proposed amendments to Rules 73-75 of the Federal Rules of Civil Procedure, I do not think it necessary that they be considered at a special meeting of the Standing Committee.

The Sub-Committee makes eight suggestions for changes in those provisions of the Uniform Appellate Rules which have been incorporated as proposed amendments of the Civil and Criminal Rules. Three of those (including all suggestions for change in the Criminal Rules) have already been made, either by the Appellate Rules Committee or by the Standing Committee. One, involving a provision terminating the running of the time for appeal if the district court erroneously accepts as timely an untimely motion, has been the subject of extended consideration by the Appellate, Civil and Standing Committee, which last voted to defer action pending further study.

Of the remaining four suggestions, one, involving provision for consolidated appeals, has been adopted in principle by the Appellate Rules Committee; it will appear in the Appellate Rules, but it seems inappropriate in the dis-

trict court rules respecting appeals. Another, to the effect that the copy of the docket entries made part of the record on appeal by proposed Rule 75(a) need not be certified, is matter for reconsideration by the Appellate Rules Committee, but it may properly be regarded asminor.

The final two suggestions would: (1) "dispense with a supersedeas bond on appeal in proper cases;" and (2) require that the notice of appeal contain the names of the parties to the appeal.

Those suggestions seem clearly to be of such substance as to require study and consideration by the Appellate Rules Committee, and ought not, in my judgment, be acted upon until that Committee can present its recommendations.

With the single exception of the suggestion that the docket entries need not be certified, none of the suggestions affirmatively quarrels with the provisions of the proposed amendments. Each suggests improvements by additions. Under the circumstancesthe suggestions can best await the further consideration of the Appellate Rules Committee.

With every best wish, I remain,

Sincerely Yours,

Bernard J. Ward
Reporter
Appellate Rules Committee

Copies to:

Judge Prettyman
Members of Standing Committee
Reporters

Reply to:
Edward L. Barrett, Jr.
University of California
School of Law
Davis, California

August 23, 1965

Judge Albert B. Maris
5050 United States Courthouse
Philadelphia, Pennsylvania 19107

Dear Judge Maris:

Regarding the American Bar Association Committee recommendations re the criminal rules, I have the following comments:

(1) Rule 6. Proposals for amendment to Rule 6 similar to those made by the A.B.A. Committee were rejected earlier by the Advisory Committee on Criminal Rules. I agree that the whole question of secrecy of Grand Jury minutes needs further consideration by the Advisory Committee. I do not think, however, that this is the kind of a change which can be made at this date without circulation and full discussion. Their recommendation will be on the agenda for future Advisory Committee discussion and they could be so advised.

(2) Rule 16. Both of the specific objections made by the A.B.A. Committee to Rule 16 were discussed at the standing committee meeting in June. The standing committee decided to retain subdivision c permitting discovery by the government. I assume this was a policy decision on the point. The constitution issue is involved, I understand, in a case from California now pending in the United States Supreme Court. The second objection was met at least in part by the amendment made by the standing committee requiring the attorney for the Government to use due diligence. It would not be possible at this point to go back to the version of Rule 16 placed in the first preliminary draft. The Advisory Committee was convinced that that draft had many serious defects. Again I see no need for a special meeting of the standing committee unless the committee wants to just delete subdivision c. As to the rest,

it seems to me that the proposed rule is a substantial advance and that the problem of further expanding the scope of defendant discovery will certainly be one that continues on the agenda of the Advisory Committee.

(3) Rule 24. The objection raised to the words "are found to be" has been made previously by Mr. Welsh and thoroughly canvassed by the Advisory Committee. We cannot understand the point of his objection. Without the addition of these words, a discovery that a juror was disqualified at the time he was seated would necessarily result in a mistrial. With the words the trial should go on with an alternate juror. It seemed to us that the addition of these words, then, would reduce the incentive for continuing examination into the qualification of jurors after the trial began since the only consequence of discovering a disqualifying fact would be to call for the substitution of an alternate juror. In short I think this objection has no basis in fact and certainly would not be a reason for a special meeting of the standing committee.

(4) Rule 49. There is some point to the suggestion made here. Our committee was of the opinion that this problem could probably be handled by stipulation of counsel. I doubt that there would be any great practical consequences of the kind envisaged by the A.B.A. The Rule could be cleaned up on our next go round on amendments. I see nothing of sufficient urgency here to call for special change in the rule at this late date.

On the whole I see nothing in the A.B.A. Committee reports which would warrent a special meeting of the standing committee or any further changes in the criminal rules going to the Judicial Conference. It might be useful for you to write a letter to the appropriate person in the American Bar Association pointing out that some of these objections have already been taken care of and that the others will be on the agenda for future consideration by the Advisory Committee on Criminal Rules.

I see by your letter that the Judicial Conference meeting is on September 22. I sincerely hope that there would be no necessity for my presence at that time since that is also the week of the California State Bar Association and I am obligated to speak to the conference of California Judges on the afternoon of the 22 and to the Bar on the 24.

Sincerely yours,

Edward L. Barrett, Jr.
Dean, School of Law

ELB:eg

cc: Judge Pickett
Mr. Foley

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
SUPREME COURT BUILDING
WASHINGTON 25, D. C.

Reply to:
Edward L. Barrett, Jr.
School of Law
University of California
Davis, California

August 16, 1965

Mrs. Peggy Burgess
Committee on Rules of Practice and Procedure
of the
Judicial Conference of the United States
Supreme Court Building
Washington 25, D. C.

Dear Peggy:

Thank you for your letter of August 9. The change in Rule 28 from "in the record" to "with the clerk" was made at the suggestion of Judge Maris which was forwarded by him in a letter of July 2 including a copy of the rough notes taken at the meeting. I think then that this presents no problem.

Sincerely yours,

Ed

Edward L. Barrett, Jr.
Dean, School of Law

ELB:cg